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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No.

CLARKE RAYMOND MOORE and JOHN BERNARD SPELZ,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI
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The petitioners, Clarke Raymond Moore and John Bernard Spelz, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 14, 1971.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears as Appendix (hereinafter App.) A

herein. The order of the Court of Appeals denying a rehearing is reproduced as Appendix B. No opinion was rendered by the District Court for the Eastern District of Kentucky.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on December 14, 1971, affirming each petitioner's conviction in the United States District Court for the Eastern District of Kentucky on September 14, 1970. A timely petition for rehearing was denied on February 3, 1972. On February 22, 1972, Mr. Justice Stewart extended the time for filing a petition for writ of certiorari herein to and including April 3, 1972.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

(1) Whether the Fourth Amendment necessitates the exclusion of evidence seized but not listed on the inventory of property taken in the execution of a search warrant as mandated by Rule 41(d), Federal Rules of Criminal Procedure.

(2) Whether the affidavit of an agent of the Bureau of Drug Abuse Control in support of a search warrant supplies the necessary requirements to establish probable cause for the issuance of a war-

rant consistent with the Fourth Amendment of the United States Constitution when;

(A) The essential allegations purporting to establish probable cause are wholly conclusory, supplying none of the underlying facts so as to permit the magistrate to formulate an independent determination of probable cause, and

(B) The underlying source of the critical allegations contained therein are unidentified.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF COURT INVOLVED

The constitutional provisions, statutes, and rules of court involved are the following, all of which are set forth in Appendix E.

United States Constitution, Fourth Amendment;

21 U.S.C. §§331(q)(1); 321(v)(3); and 21 C.F.R. 166.3;

Espionage Act, 40 Stat. 228 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§10496 1/4a-10496 1/4v);

Federal Rules of Criminal Procedure, Rule 41(d) and (e).

STATEMENT OF THE CASE

Petitioners were tried by a jury and convicted in the United States District Court for the Eastern District of Kentucky. The jurisdiction of the District

Court was invoked by an indictment[1] returned by the Federal Grand Jury in September of 1969.

Each petitioner was convicted of Counts I and II. The petitioners were sentenced to one year on each of Counts I and II; the sentences on each count to run consecutively.

On December 14, 1971, the Court of Appeals for the Sixth Circuit affirmed the judgment of conviction as to Counts I and II holding that the Exhibit not listed on the inventory was properly admitted into evidence and that the affidavit in support of the search warrant was sufficient.

Thereafter petitioners filed a petition for rehearing before the Court of Appeals for the Sixth Circuit. That petition was denied without opinion on February 3, 1972.

The evidence material to this petition is summarized as follows:

On March 31, 1968, federal agents executing a search warrant entered commercial premises in Covington, Kentucky. (Tr. 375) They found Moore and Spelz standing over a 30-gallon plastic can containing 3-indolediethylglyoxylamide. (Tr. 759-760) The can was resting on an ice bed and its contents were being agitated by an electric mixer. They also found a

---

[1]Each of the petitioners was charged in Counts I and II of the Indictment with conspiring to knowingly manufacture, compound, process and process for sale, depressant or stimulant drugs; to wit: diethyltryptamine, in violation of 21 U.S.C. §331 (q)(1)(Count I); and, unlawfully and knowingly engaging in the manufacture of diethyltryptamine, a depressant or stimulant drug, in violation of 21 U.S.C. §§331(q)(1); 321(v)(3) and 21 C.F.R. 166.3 (Count II).

large quantity of laboratory apparatus, numerous chemical reagents, including diethylamine and lithium aluminum hydride, and a chemistry handbook. (Tr. 354 et seq.) Another defendant, Charles Reinking was discovered in an adjacent room washing laboratory glassware.

The building was leased to Spelz. He had purchased, directly or through agents, everything on the premises. Some of the chemicals had been purchased through a Chicago mail-drop in the name of Ansonia Associates. The purchasers had used the stamped signature of Thomas Anderson, a fictitious name. Moore, through the efforts of a Chicago acquaintance, made arrangements for the mail-drop, forwarded Spelz's orders for chemicals to be delivered to the mail-drop, picked up chemicals at the mail-drop and transported them to the laboratory in Covington (Tr. 130 et seq.)

After the initial search petitioners were arrested. The federal agents remained in charge of the premises for a period of three days during which they photographed the entire building and compiled a complete inventory of the contents of the building. (Tr. 275, App. C) The agents then removed all of the items from the premises which had been listed on their inventory.

At trial the Government introduced Exhibit 11, documents denominated "SYNTHESIS OF N, N-DIMETHYLTRYPTAMINE (DMT)" and "SYNTHESIS OF TRYPTAMINES," over the objection of petitioners. (Tr. 290, 403, 413) These documents

described the procedures and chemicals required for the production of DMT and tryptamines, respectively. DMT is a species of the genus tryptamine. Government agents testified that Exhibit 11 was found on a laboratory table adjacent to the chemical handbook. (Tr. 274)

Exhibit 11 was not included in the detailed inventory which was returned with the search warrant. (Tr. 403) A photograph of the laboratory table revealed the chemistry handbook but did not show Exhibit 11. (Tr. 324-326) Spelz and Moore denied any connection with or knowledge of Exhibit 11.

Charles Reinking did not testify and was acquitted. After his acquittal, Reinking made a statement under oath that Exhibit 11 was in an envelope located in Reinking's automobile which was parked outside of the premises at the time of the entry of the Government agents. [Appendix to Appeal Brief for Appellants, pp. 36-61]

Expert testimony by Government chemists, supported by cross-examination of the defense chemist, showed that the addition of lithium aluminum hydride to the contents of the can would yield DET. Exhibit 11 showed, as a final step in the production of DMT, the addition of lithium aluminum hydride to the final intermediate, 3-indolediethylglyoxylamide. (Tr. 281 et seq.; 582 et seq.) The testimony further revealed that the synthesis of DET and DMT were essentially identical except that diethylamine was used to produce DET while dimethylamine was used to produce DMT and that following the synthesis out-

lined in Exhibit 11 with diethylamine would yield 3-indolediethylglyoxylamide as the final intermediate. (Tr. 578-592)

Spelz and Moore testified that Spelz was engaged in basic organic chemistry research. Cross-examination of Government chemists and direct examination of the defense chemist showed that by following known procedures with various chemicals the contents of the can could yield a vast number of organic compounds. (Tr. 704, 1009 et seq.)

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS AND IT DECIDES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

In rejecting petitioners' argument that the introduction into evidence of Exhibit 11 was reversible error, the Court of Appeals assumed the existence of a uniform rule; that because the return of a search warrant is a ministerial act, procedural failures in the return do not affect the admissibility of evidence thus seized. The Court therefore justified its holding on the basis that petitioners did not ". . . demonstrate that the failure to list Exhibit 11 [on the inventory] was prejudicial." (App. A, p. 6) The Court of Appeals, we respectfully urge, was mistaken.

A) There is a split of opinion between the Courts of Appeals on the issue of the effect of non-compliance with the return of search warrant provisions of Rule 41(d), Federal Rules of Criminal Procedure. Contrary to the Court of Appeals holding in this case, the First Circuit has held that non-compliance with these provisions is fatal to the search and evidence obtained thereby is inadmissible. This Court has never ruled on this issue.

B) The provisions of Rule 41(d) for the return of search warrants are mandatory procedural safeguards of an individual's rights as secured by the Fourth Amendment to the United States Constitution and are essential to the orderly administration of justice. Therefore a demonstration of prejudice was not essential for the admission of Exhibit 11 to have been reversible error.

C) The failure of the trial court to suppress Exhibit 11 was prejudicial to petitioners and a denial of due process of law. Because petitioners did not know of the Government's intent to use Exhibit 11, they were effectively denied their right to seek its suppression by pre-trial review and their right to gain the benefit of the exculpatory testimony of a co-defendant, by way of pre-trial motion for a severance.

A. There is a split of opinion between the Courts of Appeals on the issue of the effect of non-compliance with the return of search warrant provisions of Rule 41(d), Federal Rules of Criminal Procedure. Contrary to the court's holding in this case, the First Circuit has held that non-compliance with these provisions is fatal to the search and evidence obtained thereby is inadmissible. This Court has never ruled on this issue.

Rule 41(d), Federal Rules of Criminal Procedure provides that in executing a search warrant, law enforcement officials are required to make a detailed inventory of all property seized, leave a copy of the warrant and a receipt for all property seized with the person from whom the property was taken and return the warrant with a copy of the inventory to the commissioner or judge who issued the warrant.[2]

Very little has been written about the specific reasons for requiring the inventory and receipt in the execution and return of a search warrant and the Courts of Appeals are in conflict about the effect of

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[2]Federal Rules of Criminal Procedure, Rule 41(d):

"The warrant may be executed and returned only within 10 days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge or commissioner shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant."

total or partial non-compliance with these requirements on the validity of the search and seizure.

For purposes of this argument it is necessary to refer to some cases which preceded the passage of Rule 41(d). These older cases involve the search and seizure provisions of the Espionage Act, 40 Stat. 228. Sections 11, 12 and 13 of that Act contain virtually the identical language of Rule 41(d). (See App. E)

One early Sixth Circuit case, *Rose v. United States*, 274 F. 245 (6th Cir. 1921), cert. denied, 257 U.S. 655 (1922), cited by the Court of Appeals in the present case, held that a total failure to comply with the return of warrant requirements of the Espionage Act did not invalidate the search and seizure. The Court's rationale was: "The making of the return is merely a ministerial act to be performed after the warrant is executed." Id. at 251[3]

In direct conflict is the First Circuit's ruling in *Marby v. United States*, 293 F. 849 (1st Cir. 1923). The Court in *Marby* held that the failure to comply with the required procedure of issuing a detailed receipt at the time of executing the warrant voided the search warrant proceedings and the evidence obtained thereby was inadmissible. The Court cited *Giles v. United States*, 284 F. 208 (1st Cir. 1922) in which the First Circuit had also observed that a warrant was defective if the return did not indicate compliance with the receipt requirements of the Espio-

[3] *Rose* is the only decision petitioners could find which sanctioned total non-compliance with the return of warrant requirements. The facts in *Rose* were such that any error in the admission of the questioned evidence may have been harmless.

nage Act. Cf. *United States v. Kaplan,* 286 F. 963 (S.D. Geo. 1923)

This conflict between the Courts of Appeals has never been resolved. Some Courts have ruled that admission of evidence obtained in a search which did not comply with the requirements of Rule 41(d) was not per se reversible error. In *United States v. Greene,* 141 F. Supp. 856 (D.D.C. 1956) also cited by the Court of Appeals in the present case, evidence that was not listed on the inventory was admitted into evidence. However, that evidence was completely cumulative in its effect. *United States v. Zager,* 14 F. Supp. 23 (D. Md. 1936) affirmed 84 F.2d 1023 (4th Cir. 1937) cert. denied, 299 U.S. 558 (cumulative evidence). Also see *United States v. Sims,* 202 F. Supp. 65 (E.D. Tenn. 1962) (Evidence admitted not part of inventory but court indicated the evidence would have been admissible even if seized without a warrant)

Still other courts have concluded that partial non-compliance with the requirements of Rule 41(d) does not invalidate an otherwise lawful search and seizure so long as that non-compliance has been cured without prejudice to the defendant. For example, in *United States v. Hooper,* 320 F. Supp. 507 (E.D. Tenn. 1969), affirmed 438 F.2d 968 (6th Cir. 1970), a receipt was not given to the defendant at the time of the search but a certified copy of the inventory was mailed to him within a few days after the search. The Court held that the "Total Atmosphere" of the search did not violate the citizen's right to privacy

within the broad sweep of the Fourth Amendment. However, the Court went on to state that it would not tolerate non-compliance with the requirements of Rule 41(d). Also see: *United States v. McKenzie*, 446 F.2d 949 (6th Cir. 1971) (Defendant given receipt and copy of warrant one day after the search; *Evans v. United States*, 242 F.2d 534 (6th Cir. 1957) cert. denied 353 U.S. 976 (1959) (return of warrant to different district); *Nordelli v. United States*, 24 F.2d 665 (9th Cir. 1928) (Copy of receipt and warrant actually left with defendant although not recited in return of warrant); *United States v. Klapholz*, 17 F.R.D. 18 (S.D.N.Y. 1955) affirmed 230 F.2d 494 (2nd Cir. 1956) cert. denied, 357 U.S. 924 (1956) (copy of inventory and warrant left, but no receipt; court ordered receipt issued within five days)

In the present case the partial non-compliance, the failure to list Exhibit 11 on the inventory, was never cured and was an infringement of defendant's Fourth Amendment rights. Because that non-compliance posed a substantial threat to Fourth Amendment rights, it should not have been tolerated. "Failure to comply with the requirements of Rule 41(d) cannot be disregarded. To sanction non-compliance with the statute would nullify its purpose." *United States v. Gross*, 137 F. Supp. 244, 249 (S.D.N.Y. 1956) Cf. *United States v. Birrell*, 269 F. Supp. 716 (S.D.N.Y. 1967). However, the conflict between the courts remains. This Court should now resolve that conflict.

B. The provisions of Rule 41(d) for the return of search warrants are mandatory procedural safeguards of an individual's rights as secured by the Fourth Amendment to the United States Constitution and are essential to the orderly administration of justice. Therefore a demonstration of prejudice was not essential for the admission of Exhibit 11 to have been reversible error.

The Fourth Amendment of the United States Constitution provides that people have the right to be secure against unreasonable searches and seizures. It further provides protection of that right by requiring every search warrant to set forth the place to be searched and the items to be seized. The power to search and seize has always been considered ". . . a power capable of such oppressive and liberty destroying use that its use should be strictly guarded and exercised." *Giles v. United States,* 284 F. 208, 212 (1st Cir. 1922)

To "guard" against abuse of the power to search and seize, both Congress and this Court have set forth standards of conduct for law enforcement officials. A violation of the rules governing search and seizure results in the exclusion of evidence thus obtained. *Mapp v. Ohio,* 367 U.S. 643 (1961)

It was not, as the Court of Appeals held, incumbent on the defendants to demonstrate the prejudice involved in the failure to list Exhibit 11 on the inventory. Rather, the mere fact of non-compliance with the provisions of Rule 41(d) should have created a duty on the Court to exclude the non-listed evidence. The "exclusionary rule" does not require a demonstration of prejudice for its operation. Rather, it is intended as a deterrent to law enforcement officials'

tendency to become so enthusiastic in their investigative functions as to infringe on rights protected by the Fourth Amendment. The issue of prejudice comes into play only after the evidence has been erroneously admitted and the "harmless error" question arises.

Because so little has been written about the reasons for Rule 41(d)'s requirement of an inventory, one must look to the entire Rule to discern its purpose. Rule 41(d) requires a receipt which presumably protects a person's property against theft in the guise of a search. Rule 41(d) provides that in addition to his receipt, the defendant is entitled to a copy of the inventory. By comparing the two, an individual could determine whether there had been any additions to, or deletions from, the seized property. The rule also requires that the completed inventory accompany the return of the warrant.

Regardless of the ministerial nature of the act, the requirements of Rule 41(d) are critical in the protection against illegal searches and seizures. The return with the inventory allows a judge or magistrate to verify that the search was properly conducted; that the place named was the place searched and the seizures were proper. The requirement of the inventory obviates the possibility that property seized without a warrant could be co-mingled with property seized in a warrant-based search.

In the present case, the failure to list Exhibit 11 in the inventory should have been fatal to its introduction into evidence. In view of the Constitutional rights to be protected, the inventory, with the affidavit

of its accuracy, should have created an irrebuttable presumption of its completeness. The asserted location of Exhibit 11 in the laboratory could not be objectively verified by a photograph of its supposed location (Exhibit 2). The agents took three days to meticulously search the laboratory and make their inventory. No unlawful drugs were found. Exhibit 11 was the strongest link between Spelz and Moore and the theory that the chemicals in their possession might have been used to manufacture contraband drugs. It is doubtful that the Government agents would have forgotten to list their strongest piece of evidence. The failure of the trial court to strike Exhibit 11 was a violation of constitutionally protected rights and was reversible error.

C. The failure of the Trial Court to suppress Exhibit 11 was prejudicial to petitioners and a denial of due process of law. Because petitioners did not know of the Government's intent to use Exhibit 11, they were effectively denied their right to seek its suppression by pre-trial review and their right to gain the benefit of the exculpatory testimony of a co-defendant, by way of pre-trial motion for a severance.

Because petitioners were not aware of the Government's possession or intent to use Exhibit 11 until it had been introduced at the trial, they were denied valuable pre-trial suppression proceedings pursuant to Rule 41(e) Federal Rules of Criminal Procedure. Additionally, if defense counsel had known of Exhibit 11 prior to trial, they would have been able to bring a motion to sever defendant Reinking from the trial of Moore and Spelz. Reinking would thus have been able to testify that Exhibit 11 was in his

car at the time of the search. (No search warrant had been issued to search the car.) As a co-defendant, Reinking could not have been forced to so testify. See *United States v. Echeles*, 352 F.2d 892, 898 (7th Cir. 1965) Therefore, petitioners were prejudiced by the admission of Exhibit 11 and that prejudice constituted a denial of due process of law.

We believe that the Sixth Circuit Court of Appeals' opinion is in conflict with the decision of other Courts of Appeals. Because important constitutional rights will be protected by a resolution of that conflict, we respectfully submit that certiorari should be granted.

II

THE DECISION OF THE COURT OF APPEALS DECIDES AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The affidavit[4] of the agent of the Bureau of Drug Abuse Control in support of the search warrant did not supply the necessary requirements to establish probable cause for the issuance of a warrant consistent with the Fourth Amendment of the United States Constitution, because:

A) The essential allegations purporting to establish probable cause are wholly conclusory, supplying none of the underlying facts that would permit the magistrate to formulate an independent determination of probable cause, and

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[4](For the convenience of the Court the entire affidavit is reproduced in App. D).

B) The underlying source of the critical allegations contained therein are unidentified.

A. The essential allegations purporting to establish probable cause are wholly conclusory, supplying none of the underlying facts that would permit the magistrate to formulate an independent determination of probable cause.

The rationale for requiring that a search warrant be obtained is founded upon the premise that prior to invading a person's privacy, a neutral and detached person should independently assess the persuasiveness of the facts relied upon by the police agency to establish probable cause. This is the basis of the this Court's decisions in *Nathanson v. United States,* 290 U.S. 41 (1933), *Giordenello v. United States,* 357 U.S. 480 (1958), *Aguilar v. Texas,* 378 U.S. 108 (1964), *Spinelli v. United States,* 393 U.S. 410 (1969), *Whiteley v. Warden,* 401 U.S. 560 (1971), *Harris v. United States,* 403 U.S. 573 (1971). As Justice Stewart wrote in *Coolidge v. New Hampshire,* 403 U.S. 433 (1971) at 444:

> The classic statement of the policy underlying the warrant requirement of the Fourth Amendment is that of Mr. Justice Jackson, writing for the Court in *Johnson v. United States,* 333 U.S. 10, 13-14:
>
> > "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime * * *"

The Fourth Amendment requires that the magistrate himself formulate the conclusions upon which probable cause is predicated.

In the present case, the essential allegations which purport to convert ostensibly innocent, legal activity into covert and probable illegal activity are as follows:

> ". . . Chicago Field Office . . . received information from the New York Field Office . . . that a firm using the name of ANSONIA ASSOCIATES, . . . allegedly a Cosmetic Firm, had ordered a large quantity of chemical precursors which are known to be used in the illicit manufacture of hallucinogenic drugs, . . ."
>
> "Responsible person in this alleged firm is Thomas R. Anderson and it was later determined that this individual's true identity may possibly be CLARK MOORE and that the name ANDERSON is fictitious."
>
> ". . . the answering service received parcels containing chemical precursors for utilization in the manufacture of hallucinogenic drugs, to be held for CLARK MOORE."
>
> "Inquiry with the U.S. Food and Drug Administration revealed that this firm is not of record with that Agency as a legitimate cosmetic firm."
>
> ". . . that MOORE . . . did pick up the chemical precursors . . . the subject did leave Chicago . . . with the chemical precursors . . ."
>
> "Examination of that container revealed that it was empty and had labeled thereon 'American Indole', which is a common precursor utilized in the illicit manufacturing of hallucinogens."
>
> "It is a known factor that ether is utilized in the illicit manufacture of DET and DMT and during

surveillance of said location on Sunday, March 31, 1968, surveillance Agents could smell strong odors coming from the building in question which is believed to be ether."

"In addition it is known that the chemical precursors obtained are not common in the manufacture of cosmetics."

Each of the enumerated averments is conclusory, incorporating either or both of the following fundamental defects:

First, no "underlying facts" which might support the proffered conclusions are provided. Second, the crucial allegations, concerning the nature of the chemicals and purposes for which they may be used, require the opinion of an expert and an assessment of his qualifications. Neither of these is supplied.

The premise upon which probable cause is predicated relies upon the ordering, receipt and delivery to the address for which the warrant is sought, of chemicals "known to be used in the illicit manufacture of hallucinogenic drugs." Nowhere is the magistrate apprised of what chemicals were supposedly ordered, or what chemicals, if any, were received. Nor is there any indication of whether the purported chemicals are relatively common or esoteric in the functioning of a basic laboratory. Needless to say, in order for the asserted conclusion to be made, the nature of the chemicals delivered must be compared to chemicals used in the illicit manufacture of hallucinogens.

The failure to provide the magistrate with the "underlying facts", fatal in itself, is compounded by

the nature of the conclusions. The basis of an opinion concerning the nature of certain chemicals, and the purpose for which they may be used, is outside the layman's general knowledge. For the magistrate to fulfill his duty under the Fourth Amendment, he must not only be provided with the underlying facts used in formulating the opinion, he must assess the qualifications of the person rendering such an opinion.

This aspect of the magistrate's duty is made clear in *Johnson*, wherein the Court stated in regards to the detection of odors;

> "That decision (*Taylor v. United States*, 286 U.S. 1, 6) held only that odors alone do not authorize a search without warrant. If the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant." *Johnson* at p. 13.

C.f. *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968)

The rationale applies not only to the allegation concerning the detection of ether, but encompasses the more severe problem of offering scientific conclusions without providing the magistrate any basis upon which to evaluate their accuracy.

As a substitute for factual verification, the affiant has used the encompassing term "known." In *Spinelli*, the Court rejected as entitled to no weight the allegation that Spinelli was "known" to the affiant as a

gambler, characterizing such an assertion as "bald and unilluminating," supra, at 414. While *Harris* has clarified the Court's position in regards to statements concerning reputation, it is submitted that in the context of these allegations, such averments are of absolutely no assistance to the magistrate, and should be entirely discounted. Excluding the conclusory allegations, the affidavit is devoid of the required factual basis upon which the magistrate could find probable cause.

It should be noted that the affidavit does not contain allegations of directly perceived illegal activity related by an informant or other third party. Rather, the affidavit purports to furnish circumstances from which the inference may be drawn that illegal activity is occurring and probable cause exists. The Fourth Amendment delegates to the magistrate the responsibility for assessing the persuasiveness of the facts and the formulating of an independent determination. Without the source of the information and the underlying facts submitted to the magistrate, this responsibility is shifted to the adversary affiant. Although there are numerous allegations provided, the quality of the same may not be elevated by mere quantity. In sustaining the sufficiency of this affidavit, the Court of Appeals' decision is in conflict with the fundamental decisions of this Court in *Nathanson, Giordenello, Aguilar, Spinelle* and *Whiteley,* which require the magistrate to function as an independent entity.

B. The underlying source of the critical allegations contained therein are unidentified.

The Court of Appeals erred in holding that there was a substantial basis for crediting the hearsay. (App. A, p. 5) Because the hearsay consists primarily of conclusory averments, additional problems existed which were not considered by the Court of Appeals.

The source of the conclusory averments is not specifically identified. Further there is no allegation that any of the corroborating facts are within the personal knowledge of the affiant and no allegation that those facts which were not based on personal observation of the affiant were gained officially from the observations of authorized agents. See *United States v. Ventresca,* 380 U.S. 102 (1965)

In "crediting the hearsay" the magistrate must have considered the conclusory allegations as a sufficient basis for probable cause. In affirming the convictions, the Court of Appeals erroneously held that it was permissible to thus convert the conclusory allegations into probable cause on the basis of their having been transmitted to the magistrate by an intermediary police agent. This method of attempting to establish probable cause has been held invalid in *Aguilar, supra,* p. 14 at n. 4.

By the omission of the source of the conclusory averments, the magistrate was forced not only to rely upon another's conclusion, but one who remained unidentified. This does not comply with the duty of a magistrate as imposed by the Fourth Amendment and the decisions of this Court. See citations at page 17, *supra.*

Because the Court of Appeals' decision is in conflict with numerous decisions of this Court, including the foregoing, and because the principle requiring that the underlying facts supporting conclusory allegations in an affidavit for a search must be set forth is of such vast importance, we respectfully submit that certiorari should be granted.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Dated, San Francisco, California,
March 22, 1972.

Respectfully submitted,
ANDRE T. LABORDE,
ROBERT A. KANTOR,
Attorneys for Petitioners.

(Appendices Follow)

Appendices

Appendix A

No. 71-1212

United States Court of Appeals
For the Sixth Circuit

United States of America, Plaintiff-Appellee, vs. Clarke Raymond Moore and John Bernard Spelz, Defendants-Appellants.	APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed December 14, 1971.

Before PHILLIPS, Chief Judge, and WEICK and EDWARDS, Circuit Judges.

PHILLIPS, Chief Judge. This is an appeal from a conviction for manufacturing and possessing depressant or stimulant drugs, following a jury trial and the denial of a motion for a new trial.

Clarke Moore, John Spelz, and Charles Reinking were indicted for conspiring to knowingly manufacture, compound, process and process for sale, depressant or stimulant drugs; to wit: diethyltryptamine, in violation of Title 21, U.S.C. §331(q)(1) (Count 1) and unlawfully and knowingly engaging in the manu-

facture of diethyltryptamine, a depressant or stimulant drug, in violation of Title 21 U.S.C. §§ 331(q)(1); 321 (v) (3) and 21 C.F.R. 166.3 (Count 2).[1]

Spelz was also indicted for violation of 21 U.S.C. §§ 331(q)(3), 360a(c), by unlawfully and knowingly possessing dimethyltryptamine, a "depressant or stimulant drug" within the meaning of Title 21, U.S.C. § 321(v)(3) and 21 C.F.R. 166.3 (Count 3) and unlawfully and knowingly possessing chloral hydrate, a "depressant or stimulant drug" within the meaning of 21 U.S.C. § 321(v)(3), 21 C.F.R. 166.3 and 26 U.S.C. § 4744(a)(1) (Count 4).

The facts, although somewhat technical, are largely undisputed. On March 31, 1968, federal agents executing a search warrant entered commercial premises in Covington, Kentucky. They found Moore and Spelz standing over a 30 gallon plastic can containing 3-indolediethylglyoxylamide. The can was resting on an ice bed and its contents were being agitated by an electric mixer. They also found a large quantity of laboratory apparatus, numerous chemical reagents, including diethylamine and lithium aluminum hydride, approximately 500 parsley cigarettes, loose parsley, a paint sprayer, a chemistry handbook, a bottle containing chloral hydrate and a bottle containing a small quantity of dimethyltryptamine. Reinking was dis-

[1] At the time of their commission, the offenses charged were misdemeanors. Section 331(q) was repealed by The Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 701(a), 84 Stat. 1236, 1281. The offenses are now felonies. 21 U.S.C. §§ 841, 846.

covered in an adjacent room washing laboratory glassware.

The building was leased to Spelz. He had purchased, directly or through agents, everything on the premises. Some of the chemicals had been purchased through a Chicago mail-drop in the name of Ansonia Associates by the stamped signature of Thomas Anderson, a fictitious name. Moore, through the efforts of a Chicago acquaintance, had made arrangements for the mail-drop, had forwarded Spelz's orders for chemicals to be delivered to the mail-drop, and had picked up chemicals at the mail-drop and transported them to the laboratory in Covington.

The record contains Government testimony that hallucinogens such as diethyltryptamine (DET) and dimethyltryptamine (DMT) can be ingested by smoking parsley cigarettes which have been soaked in or sprayed with the hallucinogen. The Government also introduced, as Exhibit 11, documents denominated "SYNTHESIS OF N, N-DIMETHYLTRYPTAMINE (DMT)" and "SYNTHESIS OF TRYPTAMINES." These documents described the procedures and chemicals required for the production of DMT and tryptamines, respectively. DMT is a species of the genus tryptamine. Government agents testified that Exhibit 11 was found on a laboratory table near the plastic can.

Expert testimony by Government chemists, supported by cross examination of the defense chemist, showed that addition of lithium aluminum hydride to the contents of the can would yield DET. Exhibit 11

showed, as a final step in the production of DMT, the addition of lithium aluminum hydride to the final intermediate, 3-indoledimethylglyoxylamide. The testimony further revealed that the synthesis of DET and DMT were essentially indentical except that diethylamine was used to produce DET while dimethylamine was used to produce DMT and that following the synthesis outlined in Exhibit 11 with diethylamine would yield 3-indolediethylglyoxylamide as the final intermediate.

Spelz and Moore testified that Splez was engaged in basic organic chemistry research. They denied any connection with or knowledge of Exhibit 11. Cross-examination of Government chemists and direct examination of the defense chemist showed that, by following know procedures with various chemicals, the contents of the can could yield a vast number of organic compounds. Specific patents were introduced as representative of such procedures. Reinking did not testify and was acquitted.

Following a verdict finding them guilty, Moore and Spelz filed a motion for a new trial, alleging that Exhibit 11 was in Reinking's car at the time of the raid. The motion was denied without hearing.

Moore and Spelz attack their conviction on the following grounds: (1) that the search warrant was not based on probable cause; (2) that Exhibit 11 was not listed on the return; (3) that the verdict is unsupported by the evidence; and (4) that motion for a new trial should have been granted because the verdict is based on perjured testimony.

I

The search warrant was supported by the affidavit of Agent Wysor, which is made an Appendix to this opinion. The fourth amendment mandates that "no warrant shall issue, but on probable cause, supported by oath or affirmation . . ." The principles for evaluating supporting affidavits are well established:

> "[A]ffidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." *United States v. Ventresca*, 380 U.S. 102, 108 (1965). *Accord, United States v. Harris*, 403 U.S. 573, 577 (1971).

Probable cause is made out where:

> "[T]he facts and circumstances within [the agents'] knowledge and of which they had reasonably trustworthy information were sufficient within themselves to warrant a man of reasonable caution in the belief that [a crime is being committed]." *Carroll v. United States*, 267 U.S. 132, 162 (1925).

We have reviewed the affidavit and hold that it contains facts from which the Commissioner who issued it appropriately could have found probable cause.

The affidavit sets forth the delivery of known precursors used in the manufacture of hallucinogens to a Chicago mail-drop, the use of fictitious names in the ordering of chemicals, the transportation of the chemicals from the mail-drop to Covington, the activities within the building outside normal working hours, and the odor of ether emanating from the building. We hold that these facts constitute probable cause for the Commissioner to believe that the crime of manufacturing hallucinogenic drugs was being committed inside the premises.

Appellants contend that the affidavit is largely hearsay and is defective in that it fails to set forth underlying facts upon which the hearsay may be credited. "[A]n affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant," *Aguilar v. Texas*, 378 U.S. 108, 114 (1964), so long as "a substantial basis for crediting the hearsay is presented." *Jones v. United States*, 362 U.S. 257, 269 (1960). A reasonable reading of the affidavit shows that the above facts were obtained by Government investigation and surveillance, rather than tips from unnamed informants. A substantial basis for crediting the hearsay is thus established. *See United States v. Jensen*, 432 F.2d 861 (6th Cir. 1970); *United States v. Plemmons*, 336 F.2d 731, 734 (6th Cir. 1964).

II

It is further contended that Exhibit 11 should have been excluded because it was not included in the in-

ventory accompanying the return of the warrant.[2] Appellants cite no authority in support of this position. Although it is clear that the return of the warrant is ministerial and any failure therein does not void the warrant, *e.g., Rose v. United States*, 274 F. 245, 250-51 (6th Cir.), *cert. denied*, 257 U.S. 655 (1921), the precise issue presented appears to be of first impression at the Court of Appeals level.[3] Appellants urge that the failure to include the item on the inventory, while not sufficient to invalidate the warrant, requires exclusion of the items omitted. They have failed to demonstrate that the failure to list Exhibit 11 was prejudicial. The record shows that defense counsel had an adequate opportunity to cross-examine the agents as to the location of Exhibit 11 and the reason for its omission, explored the possibility that the document was in an automobile outside the labora-

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[2] "*(d) Execution and Return with Inventory.* The warrant may be executed and returned only within 10 days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge or commissioner shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant." R. 41(d), Fed. R. Crim. P.

[3] The position of appellants has been rejected at the district court level. *See United States v. Greene*, 141 F.Supp. 856, 858-59 (D.D.C. 1956).

tory, and contested its association with the defendants. Defense counsel did not claim surprise at its introduction or request additional time to meet this evidence. Without such a showing, we decline to hold the admission of Exhibit 11 to have been reversible error.

III

The attack on the verdict as unsupported by the evidence is based on the fact that no DET was found on the premises. It is argued that the Government's proof requires an inference that appellants were manufacturing DET followed by an inference that they intended to sell the DET so made. We note at the outset that counts 1 and 2 charge manufacture of DET, not possession. Proof of manufacturing does not require that the drug actually was produced. In resolving this issue, the evidence and the legitimate inferences to be drawn therefrom must be viewed in the light most favorable to the Government. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Wolfenbarger*, 426 F.2d 992 (6th Cir. 1970). While it is undisputed that the contents of the can could have been used to produce a virtually limitless number of legal products, the immediate presence of the instructions of Exhibit 11 and of the chemical required for the final step of the synthesis described therein, when coupled with the secretive manner in which the chemicals were procured and the lack of notes and apparatus supporting Spelz's explanation of basic research, warrants an inference that DET was being manufactured. The large quantity of ma-

aterial in the can[4] considered together with the expert testimony concerning the methods of ingesting hallucinogens and the presence of parsley cigarettes further warranted an inference of an intent to sell. *See United States v. Ortiz*, 445 F.2d 1100, 1104-05 (10th Cir. 1971). Accordingly, we find the evidence sufficient to support the verdict on counts 1 and 2.

We reach a different result, however, as to the conviction of Spelz under counts 3 and 4. These counts charged Spelz with unlawful possession of DMT and chloral hydrate. The evidence showed a small amount of DMT present in one bottle and that the chloral hydrate was in one sealed drugstore bottle bearing a label correctly identifying its contents. Under the law in effect at the time of the arrest, the simple possession of DMT or chloral hydrate was not illegal; the burden of proof was on the United States to show that the possession by Spelz did not come within one of the statutory exceptions.[5]

The record contains no evidence of an intent to sell the drugs described in Counts 3 and 4, and no facts

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[4]The Government chemist testified that the contents of the can could produce approximately 22,000 doses of DET.

[5]"(e) No person, other than a person described in subsection (a) or subsection (b)(2), shall possess any depressant or stimulant drug otherwise than (1) for the personal use of himself or of a member of his household, or (2) for administration to an animal owned by him or a member of his household. In any criminal prosecution for possession of a depressant or stimulant drug in violation of this subsection (which is made a prohibited act by section 301(q)(3)), the United States shall have the burden of proof that the possession involved does not come within the exceptions contained in clauses (1) . . . ." Drug Abuse Control Amendments of 1965, Pub. L. No. 89-74, § 3(b), 79 Stat. 226, 229 (codified at 21 U.S.C. § 360a(e), repealed 1971).
Simple possession of these drugs is now illegal. 21 U.S.C. § 844.

from which a permissible inference of intent to sell could be drawn by the jury. We have summarized above the evidence supporting the conclusion that the drugs in process of being manufactured as charged in Counts 1 and 2 were intended for sale. No such evidence is in the record with respects to Counts 3 and 4.

We therefore hold that there is not sufficient evidence in the record from which the jury could have found Spelz guilty, beyond a reasonable doubt under Counts 3 and 4. The judgment of conviction of Spelz under these two counts therefore must be reversed.

IV

Appellants' motion for a new trial was based on the allegation that Exhibit 11 was in Reinking's car at the time that the building was entered by government agents. However, the record shows that defense counsel did not provide an affidavit in support of the allegation,[6] did not represent that such support was forthcoming or explain any reasons for a lack of support, and did not request a hearing on the motion. Under these circumstances, the denial of the motion was not an abuse of discretion and will be affirmed. *Cf. United States v. Crowder*, 351 F.2d 101, 104-05 (6th Cir. 1965).

Affirmed as to the convictions of both appellants under Counts 1 and 2; reversed as to the conviction of Spelz under Counts 3 and 4.

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[6]The affidavits presented to this court were prepared approximately six months after the motion was denied and have never been considered by the District Judge.

Appendix

United States District Court
for the
Eastern District of Kentucky

Commissioner's Docket No. 2
Case No. 166

United States of America

vs.

Green Brick Constructed Building W/Green Shingled Roof Known As 413 E. 17th Street, Covington, Kentucky and Occupied by Southern Scientific Co.

AFFIDAVIT FOR SEARCH WARRANT

Eastern District of Kentucky
Filed Apr. 17, 1968
Davis T. McGarvey, Clerk
U.S. District Court

Before Robert Cetrulo [Commissioner], Covington, Kentucky.

The undersigned being duly sworn deposes and says:

That he has reason to believe that on the premises known as 413 E. 17th Street, Covington, Kentucky, in the Eastern District of Kentucky, there is now be-

ing concealed certain property, namely hallucinogenic drugs, to-wit: Diethyltryptamine and Dimethyltryptamine, commonly known as DET and DMT; and certain paraphernalia and chemical precursors utilized in the illicit manufacture of said drugs, which are the means and instrumentalities used to commit offenses in violation of 21 U.S.C. 331(q)(1) and (3) and which are also subject to seizure and condemnation under 21 USC 334(a)(2).

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

(See Attached, Which Is Made A Part Of This Affidavit)

/s/ Chantland Wysor, Agent, Bureau of Drug Abuse Control

Sworn to before me and subscribed in my presence, March 31, 1968.

/s/ Robert C. Cetrulo, U.S. Commissioner

During the first part of March, 1968 the Chicago Field Office of the Bureau of Drug Abuse Control received information from the New York Field Office, Bureau of Drug Abuse Control, reporting that a firm using the name of Ansonia Associates, 100 N. LaSalle Street, Chicago, Illinois, allegely (sic) a Cosmetic Firm, had ordered a large quantity of chemical precursors which are known to be used in the illicit manufacture of hallucinogenic drugs, within the meaning of the Drug Abuse Control Amendments of 1965.

Investigation then revealed the following as regards Ansonia Associates: Responsible person in this alleged firm is Thomas R. Anderson and it was later determined that this individual's true identity may possibly be Clark Moore and that the name Anderson is fictitious. Investigation shows that the address listed for this firm is an answering service, which has been contracted to accept all telephone calls, correspondence and parcels. Persons associated with Ansonia who transact business with the answering service are Clark Moore and Ruth Terry. Investigation revealed that Moore is a resident of Columbus, Ohio and Terry is a resident of Chicago, Illinois. During the month of March, 1968 the answering service received parcels containing chemical precursors for utilization in the manufacture of hallucinogenic drugs, to be held for Clark Moore. Inquiry with the U.S. Food and Drug Administration revealed that this firm is not of record with that Agency as a legitimate cosmetic firm.

Further investigation determined that arrangements had been made for Clark Moore to travel from Columbus, Ohio to Chicago, Illinois on March 29, 1968 to pick up the chemical precursors, which were being held for Ansonia Associates. Surveillance determined that Moore did arrive in Chicago on March 29, 1968 and that on March 30, 1968 the subject did pick up the chemical precursors. Continuous surveillance on subject Moore by Agents of the Bureau of Drug Abuse Control determined that the subject did leave Chicago on March 30, 1968 with the chemical precursors in his vehicle and delivered the items to Southern

Scientific Company, 413 E. 17th Street, Covington, Kentucky, on that same date. After remaining inside 413 E. 17th Street for a short period of time subject Moore left the rear of the building, walked to an alleyway behind the building and placed a cardboard container on the ground. Examination of that container revealed that it was empty and had labeled thereon "American Indole" which is a common precursor utilized in the illicit manufacturing of hallucinogens.

Surveillance determined that subject Moore, an individual tentatively identified as John Spelz, and an unknown person, were inside Southern Scientific Company from 7:30 PM to 11:30 PM. on March 30, 1968; this being a Saturday and if the firm is legitimate these are not normal working-business hours. Surveillance again determined that the same three subjects went to the building on Sunday, March 31, 1968, at approximately 11:00 AM.

Indications that persons at Southern Scientific Company are engaged in the illegal manufacture of Hallucinogenic Drugs are: Unusual manner utilized in ordering, receiving and ultimate delivery of chemical precursors, which is a known Modus Operandi used by individuals engaged in the illicit manufacture of hallucinogenic drugs; the unusual activity at the building not during normal working-business hours; it is known that the chemical precursors in question are utilized in the illicit manufacture of Diethyltryptamine (DET) and Dimethyltryptamine (DMT), which hallucinogenic drugs within the meaning of the Drug Abuse Control Amendments of 1965; it is a known

factor that ether is utilized in the illicit manufacture of DET and DMT; and during surveillance of said location on Sunday, March 31, 1968, surveillance Agents could smell strong odors coming from the building in question which is believed to be ether. In addition it is known that the chemical precursors obtained are not common in the manufacture of cosmetics.

/s/ Chantland Wysor, Agent, Bureau of Drug Abuse Control

Sworn to before me, and subscribed in my presence this 31st day of March, 1968.

/s/ Robert C. Cetrulo, Commissioner

Appendix B

No. 71-1212

United States Court of Appeals
for the Sixth Circuit

United States of America,	Appellee,
vs.	
Clarke Raymond Moore, et al.,	Appellants.

ORDER DENYING PETITION FOR REHEARING

Before PHILLIPS, Chief Judge, and WEICK and EDWARDS, Circuit Judges.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

Entered by order of the court.

/s/ James A. Higgins
Clerk

Filed Feb. 3, 1972,
James A. Higgins, Clerk.

Appendix C

United States District Court
for the
Eastern District of Kentucky

Commissioner's Docket No. 2

Case No. 166

United States of America,

vs.

Green Brick constructed building w/ green shingled roof known as 413 E. 17th Street, Covington, Ky. and occupied by Southern Scientific Company.

SEARCH WARRANT

[Eastern District of Kentucky Filed Apr 17, 1968
Davis T. McGarvey, Clerk U. S. District Court]

To Chantland Wysor and/or any other authorized Criminal Investigators of the Bureau of Drug Abuse Control, Food and Drug Administration.

Affidavit having been made before me by Chantland Wysor, Criminal Investigator, Bureau of Drug Abuse Control, FDA that he has reason to believe that on the

premises known as 413 E. 17th Street, Covington, Kentucky, in the Eastern District of Kentucky, there is now being concealed certain property, namely hallucinogenic drugs, to wit: Diethyltryptamine and Dimethyltryptamine, commonly known as DET and DMT and certain paraphernalia and chemical precursors utilized in the illicit manufacture of said drugs, which are the means and instrumentalities used to commit offenses in violation of 21 USC 331(q)(1) and (3) and which are also subject to seizure and condemnation under 21 USC 334(a)(2), and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search in the daytime, and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 31st day of March, 1968.

/s/ Robert C. Cetrulo,
U.S. Commissioner

RETURN

I received the attached search warrant March 31, 1968, and have executed it as follows:

On March 31, 1968 at 5:45 o'clock PM, I searched the premises described in the warrant and

I left a copy of the warrant with at the place of search together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

See attached initialed 23 page inventory.

This inventory was made in the presence of Agents Philip Fisher and Roland Hughs.

I swear that this inventory is a true and detailed account of all the property taken by me on the warrant.

/s/ Chantland Wysor

Subscribed and sworn to and returned before me this 8 day of April, 1968.

/s/ Robert C. Cetrulo,
U.S. Commissioner

Appendix D

United States District Court
for the
Eastern District of Kentucky

Commissioner's Docket No. 2

Case No. 166

United States of America vs. Green Brick Constructed Building W/ Green Shingled Roof Known As 413 E. 17th Street, Covington, Kentucky and Occupied by Southern Scientific Co.

AFFIDAVIT FOR SEARCH WARRANT

[Eastern District of Kentucky Filed Apr 17, 1968
Davis T. McGarvey, Clerk U.S. District Court.]

Before Robert Cetrulo [Commissioner], Covington, Kentucky.

The undersigned being duly sworn deposes and says:

That he has reason to believe that on the premises known as 413 E. 17th Street, Covington, Kentucky, in

the Eastern District of Kentucky, there is now being concealed certain property, namely hallucinogenic drugs, to-wit: Diethyltryptamine and Dimethyltryptamine, commonly known as DET and DMT; and certain paraphernalia and chemical precursors utilized in the illicit manufacture of said drugs, which are the means and instrumentalities used to commit offenses in violation of 21 USC 331(q)(1) and (3) and which are also subject to seizure and condemnation under 21 USC 334(a)(2).

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

(See attached, which is made a part of this affidavit)

/s/ Chantland Wysor, Agent, Bureau of Drug Abuse Control

Sworn to before me and subscribed in my presence, March 31, 1968.

/s/ Robert C. Cetrulo, U.S. Commissioner

During the first part of March, 1968 the Chicago Field Office of the Bureau of Drug Abuse Control received information from the New York Field Office, Bureau of Drug Abuse Control, reporting that a firm using the name of Ansonia Associates, 100 N. LaSalle Street, Chicago, Illinois, allegedly a Cosmetic Firm, had ordered a large quantity of chemical precursors which are known to be used in the illicit manufacture of hallucinogenic drugs within the meaning of the Drug Abuse Control Amendments of 1965.

Investigation then revealed the following as regards Ansonia Associates: Responsible person in this alleged firm is Thomas R. Anderson and it was later determined that this individual's true idenity may possibly be Clark Moore and that the name Anderson is fictitious. Investigation shows that the address listed for this firm is an answering service, which has been contracted to accept all telephone calls, correspondence and parcels. Persons associated with Ansonia who transact business with the answering service are Clark Moore and Ruth Terry. Investigation revealed that Moore is a resident of Columbus, Ohio and Terry is a resident of Chicago, Illinois. During the month of March, 1968 the answering service received parcels containing chemical precursors for utilization in the manufacture of hallucinogenic drugs, to be held for Clark Moore. Inquiry with the U.S. Food and Drug Administration revealed that this firm is not of record with that Agency as a legitimate cosmetic firm.

Further investigation determined that arrangements had been made for Clark Moore to travel from Columbus, Ohio to Chicago, Illinois on March 29, 1968 to pick up the chemical precursors, which were being held for Ansonia Associates. Surveillance determined that Moore did arrive in Chicago on March 29, 1968 and that on March 30, 1968 the subject did pick up the chemical precursors. Continuous surveillance on subject Moore by Agents of the Bureau of Drug Abuse Control determined that the subject did leave Chicago on March 30, 1968 with the chemical precursors in his

vehicle and delivered the items to Southern Scientific Company, 413 E. 17th Street, Covington, Kentucky, on that same date. After remaining inside 413 E. 17th Street for a short period of time subject Moore left the rear of the building, walked to an alleyway behind the building and placed a cardboard container on the ground. Examination of that container revealed that it was empty and had labeled thereon "American Indole", which is a common precursor utilized in the illicit manufacture of hallucinogens.

Surveillance determined that subject Moore, an individual tentatively identified as John Spelz, and an unknown person, were inside Southern Scientific Company from 7:30 PM to 11:30 PM, on March 30, 1968; this being a Saturday and if the firm is legitimate these are not normal working-business hours. Surveillance again determined that the same three subjects went to the building on Sunday, March 31, 1968, at approximately 11:00 AM.

Indications that persons at Southern Scientific Company are engaged in the illegal manufacture of Hallucinogenic Drugs are: Unusual manner utilized in ordering, receiving and ultimate delivery of chemical precursors, which is a known Modus Operandi used by individuals engaged in the illicit manufacture of hallucinogenic drugs; the unusual activity at the building not during normal working-business hours; it is known that the chemical precursors in question are utilized in the illicit manufacture of Diethyltryptamine (DET) and Dimethyltryptamine (DMT), which hallucinogenic drugs within the meaning of the Drug

Abuse Control Amendments of 1965; it is a known factor that ether is utilized in the illicit manufacture of DET and DMT; and during surveillance of said location on Sunday, March 31, 1968, surveillance Agents could smell strong odors coming from the building in question which is believed to be ether. In addition it is known that the chemical precursors obtained are not common in the manufacture of cosmetics.

/s/ Chantland Wysor, Agent
Bureau of Drug Abuse Control

Sworn to before me, and subscribed in my presence this 31st day of March, 1968.

/s/ Robert C. Cetrulo, Commissioner

Appendix E

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF COURT

United States Constitution, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

21 USC §331(q)(1):

> "(q) (1) The manufacture, compounding, or processing of a drug in violation of section 511(a); (2) the sale, delivery, or other disposition of a drug in violation of section 511(b); (3) the possession of a drug in violation of section 511(c); (4) the failure to prepare or obtain, or the failure to keep, a complete and accurate record with respect to any drug as required by section 511(d); (5) the refusal to permit access to or copying of any record as required by section 511(d); (6) the refusal to permit entry or inspection as authorized by section 511(d); or (7) the filling or refilling of any prescription in violation of section 511(e)."

21 USC §321(v)(3) [1965 Amendments: P.L. 89-74 §320.3(c)(3), revised 33 CFR 14842 (1968)]:

> For the purposes of this chapter . . .
> (v) The term "depressant or stimulant drug" means— . . .
> (3) lysergic acid diethylamide and any other drug . . . which the Secretary . . . has found

to have, and by regulation designates as having a potential for abuse because of its . . . hallucinogenic effect; . . .

21 CFR §166.3(c)(3) [redesignated as 21 CFR §320.3(c)(3), revised 33 CFR 14842 (1968)]:

(c) The Director . . . designates all drugs . . . containing any amount of the following substances as having a potential for abuse because of their:

(3) Hallucinogenic effect:
LSD-25: LSD . . . d-lysergic acid diethylamide; DMT (N-Dimethyltryptamine); DET (Diethyltryptamine)

Espionage Act, 40 Stat. 228 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§10496 1/4a— 10496 1/4v):

"Section 1. A search warrant authorized by this title may be issued by a judge of a United States District Court, or by a judge of a state or territorial court of record, or by a United States commissioner for the district wherein the property sought is located.

"Sec. 2. A search warrant may be issued under this title upon either of the following grounds:

"1. When the property was stolen or embezzled in violation of a law of the United States; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or from any person in whose possession it may be.

"2. When the property was used as the means of committing a felony; in which case it may be taken on the warrant from any house or other

place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or from any person in whose possession it may be.

"3. When the property, or any paper, is possessed, controlled, or used in violation of section 22 of this title; in which case it may be taken on the warrant from the person violating said section, or from any person in whose possession it may be, or from any house or other place in which it is concealed."

(Section 22, supra, deals with papers used in violation of international obligations and has no present application.)

"Sec. 3. A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched.

"Sec. 4. The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them.

"Sec. 5. The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.

"Sec. 6. If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a civil officer of the United States duly authorized to enforce or assist in enforcing any law

thereof, or to a person so duly authorized by the President of the United States, stating the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner.

"Sec. 7. A search warrant may in all cases be served by any of the officers mentioned in its direction, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.

"Sec. 8. The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance.

"Sec. 9. He may break open any outer or inner door or window of a house for the purpose of liberating a person who, having entered to aid him in the execution of the warrant, is detained therein, or when necessary for his own liberation.

"Sec. 10. The judge or commissioner must insert a direction in the warrant that it be served in the daytime, unless the affidavits are positive that the property is on the person or in the place to be searched, in which case he may insert a direction that it be served at any time of the day or night.

"Sec. 11. A search warrant must be executed and returned to the judge or commissioner who issued it within ten days after its date; after the expiration of this time the warrant, unless executed, is void.

"Sec. 12. When the officer takes property under the warrant, he must give a copy of the warrant together with a receipt for the property taken (specifying it in detail) to the person from whom it was taken by him, or in whose possession it was found; or, in the absence of any person, he must leave it in the place where he found the property.

"Sec. 13. The officer must forthwith return the warrant to the judge or commissioner and deliver to him a written inventory of the property taken, made publicly or in the presence of the person from whose possession it was taken, and of the applicant for the warrant, if they are present, verified by the affidavit of the officer at the foot of the inventory and taken before the judge or commissioner at the time to the following effect: 'I, R. S., the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant.'"

Federal Rules of Criminal Procedure, Rule 41(d) and (e):

(d) Execution and Return with Inventory. The warrant may be executed and returned only within 10 days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant

for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge or commissioner shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

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No. 71-1257

In the Supreme Court of the United States

OCTOBER TERM, 1971

CLARKE RAYMOND MOORE AND JOHN BERNARD SPELZ,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1257

CLARKE RAYMOND MOORE AND JOHN BERNARD SPELZ,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Kentucky, petitioners were convicted on two counts of having conspired to manufacture and knowingly process for sale diethyltryptamine (a depressant or stimulant drug), and of having knowingly manufactured that drug, in violation of 21 U.S.C. (1964 ed., Supp. V) 331(q)(1). Petitioner Spelz was also convicted on two counts charging the knowing possession of other stimulant or depressant drugs. Each petitioner was sentenced to consecutive one-year terms of imprisonment on the conspiracy and manufacturing counts. The court of

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appeals affirmed the convictions on these counts but reversed, for lack of sufficient evidence, Spelz' conviction on the counts charging possession (Pet. App. A).

Petitioners' attack on the sufficiency of the affidavit to support a search warrant (set forth at Pet. App. xi–xv) is fully answered in the opinion of the court below, on which we rely (Pet. App. v–vi). With respect to the government's Exhibit 11, which was not included in the inventory accompanying the agents' return of the search warrant, the decision of the court of appeals upholding admission of this evidence does not give rise to a conflict among the circuits as petitioners claim (Pet. 9–12). The case cited by petitioners as being in conflict with the decision below—*Murby* v. *United States*, 293 Fed. 849 (C.A. 1)—held only that the evidence should be suppressed when there had been no return whatsoever. Here, where no bad faith was shown and where only a single item was omitted, the court of appeals properly ruled that since petitioners did not claim surprise at trial, the agents' failure to include the item in the return did not require its suppression. The court below pointed out that at trial the defense explored the possibility that the document comprising Exhibit 11 was in an automobile outside the laboratory (Pet. App. vii); the court further noted that in their motion for a new trial, which the district court denied, petitioners alleged that the exhibit was in Reinking's car at the time of the search of the premises, but they did not offer anything in support of the allegation and did not request a hearing (Pet. App. x).

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1972.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No. 71-1257

CLARKE RAYMOND MOORE and JOHN BERNARD SPELZ,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR REHEARING

ANDRE T. LABORDE,
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In the Supreme Court
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United States

OCTOBER TERM, 1971

No. 71-1257

CLARKE RAYMOND MOORE and JOHN BERNARD SPELZ,
Petitioners,

VS.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR REHEARING

The petitioners herein respectfully move this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered June 12, 1972, and (2) granting the petition. As grounds for this motion, petitioners state the following:

1. THE VIOLATION OF THE PROCEDURAL PROTECTION AGAINST UNREASONABLE SEARCHES AND SEIZURES

Regarding petitioners argument that Exhibit 11 should have been suppressed, still another of the Court of Appeals has entered the conflict over the ministerial nature of the return requirements of Rule 41(d), Fed. R. Crim. P., *United States v. Kennedy*, 457 F.2d 63, 67 (10th Cir. 1972). Regardless of their ministerial form, errors in the return of search warrants must invalidate the search and seizure to the extent that those errors create a substantive prejudice to the defendants. The effect of the failure to list Exhibit 11 in the instant case was substantively prejudicial (see argument C in Petition, page 15); the same prejudicial effect that was caused by the failure to make a return in *Murby v. United States*, 293 F. 849 (1st Cir.).

The Solicitor General erred in his assertion that *Murby v. United States, supra*, was not in conflict with the decision below. The *Murby* case established the rule that although the return requirements of the Espionage Act were ministerial, when the non-compliance has a substantive effect, it renders the seized evidence inadmissible. Under that rule, Exhibit 11 in the present case should not have been admitted into evidence. Petitioners have thus been denied their constitutional right to be protected against unreasonable searches and seizures. That right could only be protected by enforcement of the provisions of Rule 41(d).

2. THE DECISION OF UNITED STATES v. BAILEY, 458 F.2d 408 (9TH CIR., DECIDED MARCH 21, 1972, REHEARING DENIED JUNE 1, 1972).

On March 21, 1972, the day prior to the filing of the petition for a writ of certiorari in the instant case, the Court of Appeals for the Ninth Circuit decided the case of *United States v. Bailey, supra,* which reaffirms the principle announced in this Court's decisions in *Nathanson v. United States,* 290 U.S. 41 (1933); *Giordenello v. United States,* 357 U.S. 480 (1958); *Aguilar v. Texas,* 378 U.S. 108 (1964); *Spinelli v. United States,* 393 U.S. 410 (1969); *Whiteley v. Warden,* 401 U.S. 560 (1971); *Harris v. United States,* 403 U.S. 573 (1971), and which decision conflicts with the opinion rendered by the Sixth Circuit in this case. It is submitted by the petitioners that the Sixth Circuit erred in its application of the basic concept formulated in this Court's decisions cited above and reaffirmed by *United States v. Bailey, supra.*

The applicable principle is that the affidavit submitted to the magistrate in support of a search warrant must disclose the underlying factual circumstances that are offered to support the conclusions of the affiant. This is to insure that a neutral assessment of the validity of the conclusions is made by the magistrate, a person independent of the adversary affiant.

This is the concept which petitioners submit was misapplied in the instant case (see argument A in Petition, page 17). Both the opinion of the Sixth Circuit and the dissent in *United States v. Bailey,*

supra, fail to incorporate this vital criterion to the validity of a search warrant. The continued misunderstanding of this concept, and its application, should call for a re-evaluation of the denial of certiorari.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioners pray that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Dated, San Francisco, California,
June 30, 1972.

Respectfully submitted,
ANDRE T. LABORDE,
ROBERT A. KANTOR,
Attorneys for Petitioners.

CERTIFICATE OF COUNSEL

As counsel for the petitioners, we hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

ANDRE T. LABORDE,
ROBERT A. KANTOR,
Attorneys for Petitioners.